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No. 85-937

In The
Supreme Court of the United States
October Term, 1985

STATE OF WEST VIRGINIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WISCONSIN, WYOMING

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QUESTIONS PRESENTED

1. Whether the lower court's application of federal common law to impose prejudgment interest against a sovereign state and its refusal to accord any solicitude to the state interests implicated is contrary to

(a) The holding of *Board of Commissioners v. United States*, 308 U.S. 343 (1939), which deferred to state law in denying such interest;

(b) The previously unbroken rule of both federal and state law that interest is not to be awarded against a sovereign, absent a clear statutory or contractual requirement; and

(c) The principles of federalism underlying the above rules and decisions, which preclude a federal court from awarding interest against a state absent its consent, and absent an overriding federal interest clearly embodied in congressional enactments.

2. Whether a federal court violates the Tenth Amendment by reordering, on the basis of federal common law, a state's internal distribution of power so as to impose monetary liability on the state based on the ultra vires promises of certain of its executive officials, when such officials, under the state constitution, lacked the authority to so obligate the state.

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INTERESTS OF AMICI

Amici are the States of Arizona, California, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin and Wyoming and Commonwealths of Kentucky and Pennsylvania, and file this brief pursuant to Supreme Court Rule 36. Amici are vitally interested in the outcome of this case, which raises important issues concerning intergovernmental litigation with the United States.

The decision below establishes an unwarranted presumption in favor of the position of the United States in virtually any intergovernmental litigation, a presumption that is inconsistent with the principles of federalism. The decision below treats the claims and positions of the state of West Virginia without any regard for West Virginia's status as a state, holding that West Virginia must pay prejudgment interest because, in commercial cases involving private parties, a federal common law rule to that effect has emerged. The budgetary implications of this decision are of obvious and significant concern to amici. Without disputing Congress' power to readjust federal-state relations in this area, amici contend that imposition of judge-made rules in derogation of state laws which preclude awards of interest against the state is inconsistent with the structure of our federalism and Congress' preeminent role in accommodating divergent state and federal interests.

Amici are also vitally concerned because the decision below intrudes on the reserved powers of a state, under the Tenth Amendment, to allocate its sovereign authority among such agencies and branches as its legislature deems

necessary to protect its citizens, and to determine the methods by which the state will incur financial obligations. Many states impose limits on the manner and circumstances in which contractual liabilities or debt obligations can be incurred on behalf of the state. The lower federal courts contravened the limits of West Virginia law by concluding, apparently as a matter of federal common law, that the Governor had authority to make a contract on behalf of the state without complying with West Virginia's constitutional requirements. A federal court's after-the-fact reordering of a state's allocation of its own sovereign powers affronts state sovereignty, and, as a practical matter, prevents the states from relying on duly enacted measures to protect the state treasury.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Insofar as the decision below holds prejudgment interest to be awarded as a matter of right against sovereign states, it is inconsistent with the states' settled expectations and with prior decisions of this Court. Many states follow West Virginia's rule, prohibiting interest on awards against the state except where specifically authorized by statute or contract. In both *Board of Commissioners v. United States*, 308 U.S. 343 (1939), and *United States v. North Carolina*, 136 U.S. 211 (1890), this Court held that interest prior to judgment was not to be awarded against state or local governments, where otherwise prohibited by state law, and certainly was not to be awarded as a matter of course. Moreover, in disputes between the United States and a state, interest is not available on amounts owed by the United States. *United States v. Louisiana*, 446 U.S. 253 (1980). Simple notions of fair-

ness and consistency, thus, support the continued existence of a similar rule for states.

But more than fairness and consistency is at stake here. The Fourth Circuit's approach is in conflict with elemental constitutional principles of federalism and separation of powers. As the Court emphasized in *Board of Commissioners*, "due regard for local institutions" must be had in deciding whether to award interest. 308 U.S. at 351. Absent an "explicit legislative determination" based on Congress' judgment to alter the balance of state and federal relations, *id.* at 352, it is inappropriate for the federal judiciary to do so, particularly on the basis of commercial law cases arising between the United States and private parties. Indeed, in a somewhat different context, this Court has held that the "clear voice" rule must be followed where Congress wishes to hold states to grant conditions that intrude on their sovereignty—both to give states adequate notice of the consequences of accepting federal assistance and to assure a reasoned congressional determination that such intrusion is necessary to promote federal purposes. *Pennhurst State School & Hospital v. Halderman* (*"Pennhurst I"*), 451 U.S. 1, 17 (1981).

The Court of Appeals also apparently concluded that a separate federal common law rule should govern every issue arising in the adjudication of a state's contracts with the United States. Not only does this ignore the special sovereign position of the states, but it represents a misreading of the doctrine set forth in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), is in conflict with other circuits, and requires this Court's correction. While federal courts have power to declare "federal common law," this extraordinary power should not be exercised lightly in derogation of settled state law. In *United States v. Yazell*,

382 U.S. 341, 352 (1966), this Court held that in contracts between the United States and private parties, applicable state law was to be applied except where necessary to further "clear and substantial interests of the National Government." Where a state is the opposing party, surely no less is required. *See United States v. California,* 655 F.2d 914 (9th Cir. 1980). The Fourth Circuit's failure to apply this standard (which is plainly not met here) is in conflict with both this Court's prior decisions and the decision of the Ninth Circuit.

The practical impact of the ruling below, moreover, is substantial. Many states prohibit or limit the award of prejudgment interest against them. Every state accepts some federal assistance or funds. As this Court has said, legislation enacted pursuant to the spending clause providing funds to states "is much in the nature of a contract." *Pennhurst I,* 451 U.S. at 17. Under the decision below, interest might now be available on obligations found to be due the United States in virtually every intergovernmental dispute between the federal government and a state or local government. This would markedly change the balance in which delicate intergovernmental negotiation of disputes has generally proceeded. State and local governments should not have to decide whether to negotiate or litigate these claims without guidance from this Court on the question of whether interest can be awarded against them on these obligations.

Finally, the decision below, especially insofar as it determines the capacity of a state Governor to bind the state to a contract in derogation of state constitutional and statutory limits, violates the Tenth Amendment. It poses a threat to the essential sovereignty of West Virginia and many other states which have similar limitations on the circumstances and manner in which state contractual ob-

ligations or debts can be incurred. This is not a *Garcia*-type case; there has been no congressional determination, through the legislative process in which all states are represented, requiring a state to restructure its own internal governmental allocation of authority in order to obtain federal disaster assistance. In view of the importance of a state's control over the structure of its fiscal operations, this Court should grant review to clarify that the Tenth Amendment imposes restrictions on federal courts, absent congressional action, in intruding on the reserved powers of the states.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals' Decision Awarding Prejudgment Interest Against A Sovereign State Conflicts With This Court's Decisions In United States v. North Carolina And Board Of Commissioners v. United States, And Violates Fundamental Constitutional Principles Of Federalism And Separation Of Powers.

This Court has considered the availability of prejudgment interest in intergovernmental litigation against a state on only two occasions. In both cases the Court held that interest was not available. In *United States v. North Carolina,* 136 U.S. 211, 218-19 (1890), this Court held, consistent with the law of North Carolina and what is called the "general rule," that interest was not available against a state absent its consent. In *Board of Commissioners v. United States,* 308 U.S. 343 (1939), this Court specifically rejected the notion that the standard for determining the availability of prejudgment interest in intergovernmental litigation was the same as that applied "[i]n ordinary suits . . . between [the Government] and a private litigant." *Id.* at 350. This Court recognized the "important factor" that the dispute was between sovereigns, *id.*, and

held that a federal court may award prejudgment interest against a sovereign only where "considerations of 'public convenience' " require such an award. *Id.* at 351.

In evaluating these "considerations of 'public convenience,' " this Court stated that federal courts must give "due regard for local institutions and local interests." *Id.* Where local law prohibits the award of prejudgment interest against the sovereign, federal courts generally may not impose such an award "[i]n the absence of explicit legislative policy cutting across state interests." *Id.* at 352. The Court found that "[t]o respect the law of interest prevailing in Kansas" would not be inconsistent with explicit policies of the congressional legislation at issue, *id.* at 352, and refused to authorize an award of interest in favor of the United States and against the defendant county.

This Court's decision in *Board of Commissioners* reflects the traditional rule "that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government." *Smyth v. United States,* 302 U.S. 329, 353 (1937); *accord, e.g., Albrecht v. United States,* 329 U.S. 599, 605 (1947). This Court has recently reaffirmed this "traditional rule." *United States v. Sioux Nations of Indians,* 448 U.S. 371, 387 (1980). This Court has specifically held that where the United States was adjudged to have a contractual liability to a state, no interest may be awarded. *United States v. Louisiana,* 446 U.S. 253 (1980). Citing the traditional rule, the Court held that "in the absence of specific provisions by contract or statute, or 'express consent by Congress,' interest does not run on a claim against the United States." *Id.* at 264-65. Finding no specific provision in the written agreement which pro-

vided for the payment of prejudgment interest, the Court refused to permit Louisiana to recover some $88 million in interest. *Id.* at 265-66. Similarly, the Court found that any payments due to the United States from Louisiana under the agreement were to be "without interest." *Id.* at 272 n.4.

The decisions in *Board of Commissioners, Sioux Nations* and *United States v. Louisiana* reflect this Court's continuing recognition "that the States occupy a special and specific position in our constitutional system." *Garcia v. San Antonio Metropolitan Transit Authority,* 105 S. Ct. 1005, 1015 (1985); *see also id.* at 1023, 1027, 1029-30 (Powell, J., dissenting); *id.* at 1034 (O'Connor, J., dissenting). In "reconciling competing claims of the states and the national government[,] Congress, because it represents both State and national interests, is . . . the most suitable body to make this determination." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682, 711 (1976). Therefore, this Court has consistently "required an *unequivocal expression of congressional intent*" to impose liability upon the several states. *Pennhurst State School & Hospital v. Halderman* ("*Pennhurst II*"), 104 S. Ct. 900, 907 (1984) (emphasis added); *accord, e.g., Bennett v. Kentucky Department of Education,* 105 S. Ct. 1544, 1550 (1985); *Quern v. Jordan,* 440 U.S. 332, 343 (1979).[1] By refusing to award interest in favor of the United States in "the absence of explicit legislative policy cutting across

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[1]This Court's determination that it is for Congress, and not the courts, to define expressly the liabilities of the several states recognizes the protection afforded the states by their participation, through their representatives, in congressional enactments. *See Garcia,* 105 S. Ct. at 1016-20. The states

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state interests," 308 U.S. at 352, *Board of Commissioners* recognized the limited role of a federal court in altering the balance of relations between the states and the federal government.

In awarding prejudgment interest "as a matter of right," *United States v. State of W. Va.*, 764 F.2d 1028, 1031 (4th Cir. 1985), the court below ignored the standard set forth in *Board of Commissioners*, the long history at both the state and federal levels, of sovereign immunity from prejudgment interest, and the fact that the dispute before it was between two sovereigns. It relied on a body of case law which holds that, in contract claims against *private parties*, the federal government is entitled to an award of prejudgment interest. *Id.* It, thus, adopted the argument of the United States that it was "irrelevant" that the defendant was a sovereign state.

But, it is never "irrelevant" that a party before a *federal court* is a state. *See Board of Commissioners*, 308 U.S. at 350. To the contrary, the states' "special and specific position in our constitutional system" *Garcia*, 105 S. Ct. at 1020, requires that the federal courts consider such status as an "important factor" in their attempt to 'adjust[] the interests of two governments within the same territory." *Id.*

It is only by giving due regard to the states' status *as states* that a federal court may conduct the proper

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enjoy no such participation in individual decisions by the federal judiciary. Federal courts, thus, "should *not* promulgate federal common law rules that intrude upon [the traditional] domain [of the states] unless they have been authorized to do so by an enacting body in which the states are represented." Merrill, *The Common Law Powers of Federal Courts*, U. Chi. L. Rev. 1, 17 (1985).

analysis in balancing the rights and liabilities of the United States vis-a-vis a state. Such analysis necessitates a search by the federal court for an "explicit legislative policy" indicating Congress' intent to subject the states to a novel rule of liability in the national interest. But there is no provision in the Disaster Relief Act of 1970 evidencing *an express legislative* intent to award interest against a state on contract claims relating to it. *See Pennhurst I*, 451 U.S. at 17 (Congress must speak "with a clear voice" before specific obligations under federal grant program are imposed on the states). Nor is there any indication in the alleged "contract" that West Virginia would be obligated to pay prejudgment interest.[2] *See United States v. Louisiana*, 446 U.S. at 263-64.

Consequently, due to the absence of any express congressional intention to impose this additional obligation upon a sovereign state, or any express consent to pay it, it was not for the federal judiciary to create such a novel rule of monetary liability against a state government.[3]

2. The Court Of Appeals' Failure To Adopt The State Rule Prohibiting An Award Of Prejudgment Interest Is Inconsistent With The Principles Of The Clearfield

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[2]The Court of Appeals found that the state, like a private litigant, had "implicitly" consented to a potential award of prejudgment interest simply by forming the alleged "contract." 764 F.2d at 1053. This Court, however, has rejected this rule as applied to sovereigns and held that any contractual obligation by a sovereign to pay prejudgment interest must be "express." *United States v. Louisiana*, 446 U.S. at 263-64.

[3]*See, e.g., Pennhurst II*, 104 S.Ct. at 907; *Quern*, 440 U.S. at 343; *see* Michkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800, 814 & nn.12, 64 (1957) ("our federalism . . . seems to posit generally that in cases of doubt, the [federal] courts should use state law, leaving new extensions of federal power to the [Congress] to do.").

Trust Doctrine And With United States v. Yazell, 382 U.S. 341 (1966), And Is In Conflict With A Recent Decision Of The Ninth Circuit.

The Court of Appeals held, without specific analysis or balancing of the competing federal and state interests presented, that the right to prejudgment interest on a contract claim by the United States was governed wholly by reference to federal common law and, therefore, the court ruled that West Virginia was liable for prejudgment interest. 764 F.2d at 1030. In doing so, the Court of Appeals totally ignored West Virginia law prohibiting payment of prejudgment interest by the state. *See* Pet. for Cert. at 36 n.14.

The Court of Appeals, due to its cursory analysis of this choice of law issue, failed to give the necessary weight and attention to this "continuing problem of the interaction of federal and state laws in our complex federal system." *United States v. Yazell*, 382 U.S. 341, 342 (1966). Rather, the Court of Appeals simply reached out and created a new rule of federal common law in a manner reminiscent of the federal law merchant prevalent in the days of *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842).

Both Congress and this Court, however, have rejected the notion that federal courts are free to develop and apply federal common law rules without regard to the otherwise applicable state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Although it is sometimes necessary for a federal court "to fashion the governing rule of law according to their own standards," *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), this Court has made clear that federal courts should utilize this extraordinary power only where necessary to protect federal "programs and actions which by their nature are and must be uniform through-

out the Nation." *United States v. Yazell*, 382 U.S. 341, 354 (1966).

In *Yazell*, this Court made clear that *Clearfield Trust* "did not lay down an inflexible rule that federal law would govern all questions . . . in cases involving government contracts." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 775 (2d ed. 1975). To the contrary, *Yazell* held that federal courts, "in the absence of specific congressional action," 382 U.S. at 352, should *not* impose a federal principle of law superseding state law unless it is necessary to implement some fundamental, overriding federal interest:

> Both theory and the precedents of this Court teach us solicitude for state interests. . . . They should be overridden by federal courts *only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.*

Id. (emphasis added); *accord, e.g., United States v. Kimball Foods, Inc.*, 440 U.S. 715, 718 (1979). Absent such "clear and substantial" federal interests, federal courts are to apply the otherwise applicable state law to resolve questions concerning contracts between the United States and private parties.

The Court of Appeals baldly relied upon *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941), to impose a judicially created federal rule of decision. The court did not even inquire whether overriding the applicable law of West Virginia was necessary to effectuate the "clear and substantial interests" of the federal government. Had it made such inquiry, the court would have found, as in *Yazell*, that it was unnecessary for the federal government to "obtain a preferred right which is not pro-

vided by statute or specific agency regulation which was not a part of its bargain, and which requires overriding a state law dealing with . . . intensely local interests." 382 U.S. at 349.[4] The action taken by the United States in assisting West Virginia was not a "*nationwide* act of the Federal Government, emanating from a single source," thereby requiring uniformity in its effect. *Yazell*, 382 U.S. at 348 (emphasis added). Rather the federal action here was, as contemplated by the legislative scheme, the result of individual negotiations between the United States and West Virginia officials to respond to and ameliorate particular circumstances. *See* 764 F.2d at 1029-30. Because "[n]one of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract," *Yazell*, 382 U.S. at 353, it was simply improper here for a federal court, without explicit legislative command, to override the law of West Virginia and create a new federal rule of state liability.[5]

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[4]In *Yazell*, the government, relying on *Clearfield Trust*, asserted that protection of the substantial federal interest inherent in its disaster relief program required that the otherwise applicable state law be superseded.

This Court disagreed. It found that the only interest presented by the federal government was the same as all creditors: "every creditor wants to collect." 382 U.S. at 348. Finding that this individually negotiated disaster relief contract, unlike the situation in *Clearfield Trust*, "was not a nationwide act of the Federal Government, emanating from a single source," therefore requiring "no need for uniformity," the Court held that the interest of the United States as an ordinary creditor was insufficient to "justif[y] invading the peculiarly local jurisdiction of these States, *in disregard of their laws*. *Id.* at 353 (emphasis added).

[5]The only federal interest justifying an award of prejudgment interest discussed by the Court of Appeals was protection of the federal treasury. This Court in *Yazell*, however, expressly held that this fiscal interest was insufficient to permit

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Further, the decision below conflicts with *United States v. California*, 655 F.2d 914 (9th Cir. 1980). *See also Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2d Cir. 1984) (per curiam).[6] In *United States v. California*, the United States sued California, under the same general jurisdictional statute invoked here, to recover its costs of suppressing a fire in a national forest allegedly caused by state employees. Like the court below, the Ninth Circuit had to determine whether federal or state law provided the rule of decision applicable to the United States' monetary claim against California. After concluding that application of state law was not mandated by *Erie*, the Ninth Circuit held that, in making

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the United States, "by judicial fiat," to avoid state law. 382 U.S. at 349. As observed in *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947),

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative powers of ours. *Congress, not this court or the other federal courts, is the custodian of the national purse.* By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

(Emphasis added). Moreover, the consideration that the Court of Appeals relied upon—compensation for delay in receiving payment—is always present to justify the award of interest. Thus, this case presented no special reason to authorize departure from the settled rule that prejudgment interest is not to be awarded against a sovereign.

[6]In *Perales*, the Second Circuit affirmed a district court decision in a food stamp case that "[n]othing in the statute or regulations authorizes the assessment of interest—by the federal government—on claims against state agencies. . . . The cases cited by [the United States] are not persuasive. They involve only a right to recover interest from *a private party* as an incident of damages for breach of a commercial contract. . . . The cases in no way suggest that the United States is entitled to collect interest from a state agency on claims governed by a statute that does not authorize it to do so," 598 F. Supp. at 25 (emphasis added).

its choice of law, federal interests must be *balanced* against the "state's interest in the preservation of its control over local interests . . . and in preventing the displacement of state law," and that "*the scale of the balances are weighted in favor of borrowing state law* to fashion the federal rule of decision." 655 F.2d at 917 (emphasis added).

The court below did not seek to balance the relevant federal and state interests before pronouncing "that the right to interest herein is governed by federal, not state, law." 764 F.2d at 1030. It did not even identify the state interests that would be impaired by the application of a federal common law rule of decision, and it certainly did not weigh the scales in "favor of borrowing state law." Therefore, this Court should review the decision below to resolve the present conflict between the Circuits, put the "federal law merchant" back into its proper place, and eliminate the confusion among the lower courts on the choice and development of rules of decision in actions brought by the United States under 28 U.S.C. § 1345.

3. The Implications Of The Decision Below Call For Immediate Review By This Court.

The consequences of the Court of Appeals' decision and rationale go far beyond the instant dispute. If left undisturbed by this Court, the decision below stands as a precedent to permit federal courts to accord states no greater deference than that accorded private parties in resolving disputes with the federal government. The proposition that states will be liable for money damages to the United States to the same extent as private parties is seemingly inconsistent with our basic constitutional structure. In addition to raising troubling consti-

tutional concerns, such a precedent would have a detrimental practical impact as well.

The executive branch of the federal government may well seek prejudgment interest in claims relating to federal grant programs, and federal courts might feel free to award such prejudgment interest against states in disregard for the laws of the many states which prohibit such awards.[7] States, particularly poorer states, may, thus, be precluded from fully litigating their disputes with the federal government, despite their good faith belief in the propriety of their position, *see, e.g., Bennett*, 105 S. Ct. at 1550, for fear that they will also be held liable by a federal court for prejudgment interest.[8] And, as this case illustrates, the budgetary impact of such unascertainable liabilities can be very substantial for the states.

Further, our federalist system favors non-judicial resolution of intergovernmental disputes, a process that can often take years. The Court of Appeals decision, by making the states liable for prejudgment interest, fundamentally alters the balance in prelitigation negotiations between the states and federal government. This Court should review the decision below to remove as quickly as possible the pall of uncertainty the Fourth Circuit decision presently casts on intergovernmental negotiations, instead of requiring state and local governments to wait years until the issue can be again brought before the Court at the conclusion of a litigation.

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[7]*See, e.g., Balster v. Iowa*, 360 N.W.2d 788 (Iowa 1985) (no prejudgment interest against state); *Connecticut v. Chapman*, 407 A.2d 987 (Conn. 1978) (same); *City of Lynchburg v. Amherst County*, 115 Va. 600, 80 S.E. 117 (1913) (same).

[8]Nearly one-third of all state revenues come from federal grant or revenue-sharing programs. Advisory Commission on

(Continued on following page)

4. The Judicial Redistribution Of Authority Among The Branches Of West Virginia's Government By The Courts Below Violated The Tenth Amendment.

Like West Virginia, most state constitutions specify the circumstances and manner in which contracts can be entered into or debts incurred on behalf of the states.[9] The decision below constitutes a carte blanche, at least in disputes with the United States, and conceivably in any dispute affected by federal law, to ignore such provisions if the federal court finds them unfair or unwise. This is completely inconsistent with the reserved powers of the states under the Tenth Amendment.

Despite the weight of West Virginia's constitutional, statutory and judicial authority to the contrary, *see* Pet. for Cert. at 22-25 & nn.6, 8, the courts below concluded that West Virginia's Governor was authorized to enter into contracts binding on the state. Pet. for Cert. at B-32. In reaching this conclusion, the courts below expressly held that this issue, *the authority of a state executive officer's capacity to bind the state, is to be governed by federal common law.*[10] Pet. for Cert. at B-29 n.6.

This holding is contrary to prior decisions of this Court. *See United States v. Yazell*, 382 U.S. at 353 (state,

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Intergovernmental Relations, *Significant Features of Fiscal Federalism* 1979-1980 Edition 161 (1980). Federal audits and changing policies are likely to yield continuing disputes between the states and the federal government concerning expenditures and accountability. *See, e.g., Bennett v. New Jersey*, 105 S. Ct. 1555 (1985); *Bennett v. Kentucky Dept. of Ed.*, 105 S. Ct. 1544 (1985); *Bell v. New Jersey*, 461 U.S. 773 (1983).

[9]See D. Mondelker, D. Netsch & P. Salsick, *State and Local Government in a Federal System* 361 (1977).

[10]The courts below apparently then attempted to interpret West Virginia law regarding the Governor's authority to contract as support for its federal common law decision, finding the Governor had the requisite authority, while ignoring the state's constitutional restraint.

not federal, law controlled capacity to enter into contract with federal government); *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459 (1945) (state law determined whether state attorney general had power to consent to state being sued in federal court; although attorney general conceded that if he had such power, immunity had been waived, the Court found he lacked such power *under state law*). It is also inimical to the proper role of the federal courts within our federal system. The Tenth Amendment prohibits a federal court, on the basis of a judge-made rule of decision, from restructuring a state's division of its sovereign powers among its various branches.

In *Garcia,* this Court recognized that the Tenth Amendment prohibits the federal government from interfering with the autonomy and structure of the states' "legislative . . . departments." 105 S. Ct. at 1017 (quoting with approval *Baltimore & Ohio R. Co. v. Baugh,* 149 U.S. 368, 401 (1893) (Field, J., dissenting)); *see also Milliken v. Bradley,* 433 U.S. 267, 291 (1977); L. Tribe, *American Constitutional Law* 302 (1978) (federal government cannot "insist that a state alter its basic governmental structure"). This constitutional admonition against federal interference with the states' governmental structure applies with even greater force to the federal judiciary. *See Erie R.R. v. Tompkins; Milliken,* 433 U.S. at 267 n.23. Particular deference is due the states' determinations as to the manner in which they allocate fiscal decision-making authority within their particular structure and the individual fiscal choices made pursuant to that authority. *See, e.g., Milliken,* 433 U.S. at 291; *San Antonio School District v. Rodriguez,* 411 U.S. 1, 40 (1973); *Allied Stores v. Bowers,* 358 U.S. 522, 526 (1959).

It is apparent that the courts below simply could not fathom that a state would not permit its chief executive branch to use the totality of a state's sovereign powers in response to a natural disaster. *See* Pet. for Cert. at B-32-33. The court, therefore, ignored established West Virginia law limiting the Executive's authority, and, *as a matter of federal law,* held it did have such power. *Id.* at B-29 n.6. In so doing, it restructured the internal division of West Virginia's sovereign powers regarding fiscal policy. But federal courts may not overturn state policies simply because they "dislike[]" them. *Garcia,* 105 S. Ct. at 1015; *see also Milliken,* 433 U.S. at 291; *Rodriguez,* 411 U.S. at 40.

Garcia held that the states' Tenth Amendment rights are preserved primarily "by procedural safeguards inherent in the structure of the federal system," *fundamentally in Congress.* 105 S. Ct. at 1018. *Judicial* reordering of a state's sovereign powers, under the guise of federal common law, hardly comports with this model.[11] Unless *Garcia* means that even absent a congressional determination, there is no Tenth Amendment protection to central aspects of state sovereignty, the decision below is fundamentally inconsistent with the reserved powers of the states. Accordingly, this Court should grant certiorari and clarify that the Tenth Amendment does still function as a limit on the powers of the federal "common law" to threaten sovereign prerogatives reserved to the states by the Constitution.

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[11]As in *Yazell,* 382 U.S. at 352, it is unnecessary for this Court to decide whether Congress could permissibly impose a uniform law of capacity or agency on those persons or entities, including states, who contract with the federal government, since Congress did not do so here. *Cf., e.g., Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 615 n.13 (1974) ("[t]he Constitution does not impose on the States any particular plan for the distribution of governmental powers").

CONCLUSION

For all the foregoing reasons, amici respectfully submit that the Court should grant the writ and set the case for argument on its merits.

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